

SEP 27 1979

MICHAEL INJAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No.

78 - 1937

METRO BROADCASTING COMPANY, INC.,
APPELLANT,

v.

SECRETARIO DE HACIENDA,
APPELLEE.

**ON APPEAL FROM THE SUPREME COURT OF
THE COMMONWEALTH OF PUERTO RICO**

**BRIEF IN OPPOSITION TO
MOTION TO DISMISS**

DAVID RIVE-RIVERA
CALDERON, ROSA-SILVA & VARGAS
Box 2219
Hato Rey, Puerto Rico 00919
Attorney for Appellant

TABLE OF CONTENTS

	Page
Argument	
Appellant Raised in a Timely and Adequate Manner All Federal Constitutional Questions Be- fore the Courts of the Commonwealth of Puerto Rico	1
The Issues Are Substantial and Important to the Broadcasting Media as a Whole	3
Conclusion	4
Addendum	5

TABLE OF CITATIONS

Cases

<i>Cortes Roman v. Commonwealth</i> , 104 Colegio de Abogados 1977	3
<i>Cox Broadcasting Co. v. Cohn</i> , 420 U.S. 469 (1975)	3
<i>Radio Station W.O.W., Inc. v. Johnson</i> , 326 U.S. 120 (1944)	3
<i>Terrol v. Commonwealth of Puerto Rico</i> , — U.S. —; 61 L.Ed.2d 1; 99 S.Ct. 2425 (1979)	4
<i>W.A.P.A. TV v. Secretario de Hacienda</i> , 105 D.P.R. 816 (1977)	3

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No.

METRO BROADCASTING COMPANY, INC.,
APPELLANT,

v.

SECRETARIO DE HACIENDA,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF
THE COMMONWEALTH OF PUERTO RICO

BRIEF IN OPPOSITION TO
MOTION TO DISMISS

APPELLANT RAISED IN A TIMELY AND ADEQUATE MANNER
ALL FEDERAL CONSTITUTIONAL QUESTIONS BEFORE THE COURTS
OF THE COMMONWEALTH OF PUERTO RICO

The principal contention of the motion to dismiss is that Metro did not file a timely appeal to the Supreme Court of Puerto Rico from the judgment entered against it by

the trial court of San Juan. Although this point was never raised by the Appellee before the Supreme Court of Puerto Rico, Metro feels that it should be discussed now in order that this court understand that there are no procedural obstacles to this appeal.

At the trial court Metro sustained the position that the challenged tax was contrary to the supremacy clause of the United States Constitution. The San Juan Superior Court entered partial judgment against Metro, on November 27, 1978, deciding that the tax was valid, and that it had to be paid. (Appendix D of the Jurisdictional Statement pp. 26-69). The only pending action from then on would be the appraising of the "value" of the broadcasting license.

Metro, then, petitioned review of said judgment to the Supreme Court of Puerto Rico through Certiorari on March 7, 1979. The Supreme Court denied review without explanation.¹ (Appendix B of the Jurisdictional Statement, p. 18). Thus, the law of this case, as well as the law of Puerto Rico, remains that the licenses issued to Metro are taxable private property and that such tax is valid under the supremacy clause of the United States Constitution.

Contrary to the assertion of the Solicitor General of Puerto Rico, there was no time limit within which to request a review of the partial judgment to the Supreme Court of Puerto Rico.

Under Puerto Rico civil procedure a partial judgment which only decides liability but not damages is not "final" for purposes of appeal and is reviewable at any time prior to the fixing of damages, through certiorari, or after the

¹ It is obvious that this denial of a Certiorari cannot be cited as precedent in future cases, but it is equally evident that the highest court of Puerto Rico left undisturbed the judgment of the trial court, thus affirming it and making said judgment the law of the case.

entry of the final award of damages, through appeal or review. *Cortes Roman v. Commonwealth*, opinion of November 18, 1977.² In view of the applicability of said precedent to our case, and the failure of the Solicitor General to cite it in his motion to dismiss, we have annexed the relevant parts of said opinion as Appendix A of this reply brief.

What the appellee failed to understand is that even though said partial judgment is not final under Puerto Rican procedure it is final and appealable to this court under the criteria expounded in *Radio Station W.O.W., Inc. v. Johnson*, 326 U.S. 120 (1944) and *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

There is no possibility that the pending action at the trial court might raise any further federal constitutional questions. As a matter of fact, all federal constitutional questions had already been decided against the station owners by the Supreme Court of Puerto Rico prior to the filing of this suit in the case of *W.A.P.A. TV v. Secretario de Hacienda* (printed as Appendix A of the Jurisdictional Statement).

There is no possibility that Metro might eventually prevail on the merits, since the only pending hearing will be to determine the property value of the broadcasting licenses and impose a tax accordingly.

THE ISSUES ARE SUBSTANTIAL AND IMPORTANT TO THE BROADCASTING MEDIA AS A WHOLE

We can think of no better way to impede the exclusive federal control over radio and television if states are recognized to have the power to tax at will the broadcasting

² Published in Spanish by the Puerto Rico Bar Association, 104 Colegio de Abogados 1977.

licenses issued by the Federal Communications Commission to the stations within their boundaries.

The failure of the Commonwealth of Puerto Rico to grasp the implications of this unique tax statute can only be attributed to a belief that Puerto Rico is somehow not within the federal constitutional system.

The recent reminder of this court to the contrary in *Terrol v. Commonwealth of Puerto Rico*, — U.S. —; 61 L.Ed. 2d 1; 99 S.Ct. 2425 (1979) has apparently been disregarded and will continue to be so ignored if this anomaly is left undisturbed.

Conclusion

For the reasons and arguments of law stated in the jurisdictional statement and thus set forth herein, this Court should note probable jurisdiction and reverse the decision of the Supreme Court of Puerto Rico determining that radio and television broadcasting licenses are private property of the station owners and taxable as such.

Respectfully submitted,

DAVID RIVE-RIVERA
CALDERON, ROSA-SILVA & VARGAS
Box 2219
Hato Rey, Puerto Rico 00919
Tel. (809) 753-5050
Attorney for Appellant

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. R-76-374

GREGORIO CORTES ROMAN,

PLAINTIFF-APPELLEE,

v.

COMMONWEALTH OF PUERTO RICO

and VICTOR CARRERO FIGUEROA,

DEFENDANTS-APPELLANTS.

JUDGMENT OF THE SUPERIOR COURT, AGUADILLA PART,
ALADINO TORRES, Judge

MR. JUSTICE MARTIN delivered the opinion of the Court.

REVIEW

San Juan Puerto Rico,
November 18, 1977

This is a claim against the Commonwealth for damages sustained as a result of an accident in which the pedestrian plaintiff was run over by an automobile belonging to the Commonwealth. In its answer to the complaint, besides denying liability, the Commonwealth pleaded claimant's failure to serve notice¹ on the Secretary of Justice within the ninety-day term provided by § 3077a. of Title 32 of the Laws of Puerto Rico Annotated. Two separate trials were held at the request of the Commonwealth. Its defense of lack of notice and the question of negligence were considered in the first one. The second one was for determining the damages suffered by plaintiff.

¹ The accident took place on May 7, 1973. Notice was served on the Secretary of Justice on March 4, 1974, that is, 301 days after the accident. The complaint was filed 30 days after notice was given.

At the hearing held to consider the defense of lack of notice, plaintiff maintained, as a question of law, that the fact that there was a liability insurance policy in effect at the time of the accident exempted him from the requirement of notifying the Secretary of Justice within the ninety days following the date when plaintiff learned of the damages claimed. In his support, he cited subdivision (e) of the aforementioned § 3077a., which provides:

No judicial action of any kind may be brought against the Commonwealth of Puerto Rico for damages caused by a culpable or negligent act of the Commonwealth, unless the written notice has been served in the form and manner and within the terms prescribed in this section, unless there is just cause therefor. *This provision shall not be applicable to those cases in which the liability of the Commonwealth is covered by an insurance policy.* (Emphasis supplied.)

As an alternative, plaintiff adduced just cause for not having notified the Secretary of Justice within the statutory term, alleging that "the delay in the service of notice is not due to negligence, lack of interest on my part, but to just cause therefor."

The lower court found for plaintiff, deciding that the said subsection (e) exempts claimant from notifying the Commonwealth because its liability is covered by an insurance policy. The lower court refused to hear the evidence offered by plaintiff in support of his allegation of just cause, adjudging that the ruling made for the plaintiff as to the question of law made the introduction of evidence unnecessary. The court's decision on the question of negligence was also adverse to the Commonwealth. Consequently, the court rendered a "partial judgment" which put an end to the two questions raised and left the determi-

nation of the damages suffered by plaintiff pending for a future hearing.

The Commonwealth came before us with a petition for certiorari to review the "partial judgment" filed 101 days after it was entered and asked us to review the decision on the notice requirement entered against the Commonwealth.

After the petition was denied, the lower court heard evidence regarding the damages, and rendered a judgment on Sept. 20, 1976, ordering the Commonwealth and the co-defendant driver to solidarily pay plaintiff the amount of \$15,000 for his bodily injuries and mental suffering, plus costs and interest at the legal rate from the date of the judgment.

The Commonwealth now asks for a review of the judgment that put an end to the suit and restates its original argument, pointing out as sole error the lower court's decision "that there was no need to serve notice of the claim against the Commonwealth on the Secretary of Justice within the . . . [legal] . . . term because the State's liability was covered by an insurance policy."

Plaintiff-appellee in turn prays for the dismissal of the action on the grounds that the "partial judgment" rendered on November 28, 1975 and entered on December 8, 1975 became a final judgment on January 7, 1976, and that therefore the petition for certiorari filed on March 19, 1976, is untimely. He argues that we lack jurisdiction to consider now, in a petition for review, the same assignment of the certiorari we denied. Accordingly, plaintiff-appellee alleges that the aforesaid "partial judgment", on becoming final and unappealable on January 7, 1976, "had the force of *res judicata* and constituted the 'law of the case'." We do not agree with appellee for the reasons we shall point out below.

In view of the arguments expounded in the Motion to

Dismiss, we asked the parties to enlighten us, *inter alia*, on the following:

"... if the 'partial judgment' rendered by the lower court on November 28, 1975, is 'final and unappealable', although it does not decide the whole suit and, consequently, if the term for review should begin to run from the moment said 'partial judgment' was entered in the record, or if the term for review should be counted from the moment when the judgment which finally determines damages is entered"

I.

Section 14 of Act No. 11 of July 24, 1952, which provides for the review of the decisions of the Court of First Instance by the Supreme Court, states that *final judgments* of the Superior Court (other than those that may be appealed as a question of law) may be reviewed by the Supreme Court at the request of the party aggrieved by way of a petition for review to be issued at the discretion of the court. 4 L.P.R.A. § 37(b). What constitutes a final judgment?

The scope of the term "judgment," as used in the Rules of Civil Procedure, includes resolutions and any appealable order. 32 L.P.R.A. Ap. II, R. 44.1. On the other hand, the same Rules provide that every judgment shall grant the relief to which the prevailing party is entitled, even if said party has not prayed for such relief. *Id.* R. 44.3. This Rule 44 is derived from art. 188 of the Code of Civil Procedure of 1933, which defined judgment as "a final determination of the rights of the parties in an action or proceeding." When interpreting what constitutes a final judgment we have stated that a judgment is final if it determines the merits of the controversy or the rights of the parties, without leaving anything for future determination. See *Rieder v. Torruella*, 48 P.R.R. 846, 850 (1935). We have also held that, as a rule, "a judgment is final when it

terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce, by execution, what has been determined." See *Dalmau v. Quinones*, 78 P.R.R. 525, 530 (1955).

In certain cases included in the Rules of Civil Procedure, courts may render final judgments even if not all the questions raised are decided thereby. R. 44.2. Said Rule 44.2 is similar to former Rule 54(b) of the Rules of Civil Procedure of 1943; it reads as follows:

44.2 When *more than one claim* is presented in action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but not upon all of the claims only upon an express determination that there is no just reason for delay in pronouncing judgment on such claims until final adjudication of the case and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. 32 L.P.R.A. Ap. II R. 44.2.

In the case of *Dalmau, supra*, when constructing Rule 54(b) of 1943, which we have already stated is similar to R. 44.2 of 1958, we established the difference between the partial determination of a single claim and of several multiple claims and held that said Rule 54(b) only applied in cases involving two or more claims, and that therefore said Rule does not make a partial determination of a single claim final.² *Dalmau v. Quinones*, at 531; see 10 Wright & Miller, *Federal Practice and Procedure*, §§ 2657 *et seq.*

² Federal rule 54(b), which is equivalent to our Rule 44.2 did not apply to single claim actions. The text of the federal rule was amended in 1961 to provide that in single claim actions with multiple parties a judgment may be entered as to one of the parties involved. 6 Moore, *Federal Practice* § 54.33 (2d ed. 1976). Our Rule 44.2 has remained unchanged since 1958.

The "partial judgment" rendered in the first stage of the proceedings in this single claim action, decided some of the questions at issue but not the whole claim. The case was divided at the request of the Commonwealth for the purpose of limiting the first trial to the determination of the issue of notice on the Secretary of Justice and the question of negligence. Even if the parties had stipulated that some aspects of the claim would be discussed first and that other questions in the claim would be aired later on, such an agreement would not have authorized the court to render a final judgment deciding part of the claim. See *Dalman v. Quinones*, at 533. The relief to which plaintiff would be entitled, that is, the amount of damages, would still be left pending a decision. As long as this last point is not settled, the judgment cannot be final³ because it cannot be executed. It could even happen that the damages could not be proved, the partial judgment then becoming null.

Plaintiff cites Rule 38.2 of the Rules of Civil Procedure to show that the court below has the authority to render a "partial judgment" that may be considered final and thus open to review. The following is the text of the Rule:

The court, in furtherance of convenience or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, and it may enter judgment in accordance with the terms of Rule 44.2. 32 L.P.R.A. Ap. II, R. 38.2.

The aforesaid Rule 38.2 undoubtedly empowers the court to order a separate trial of any independent litigious issue for convenience or to avoid prejudice, and to enter judgment pursuant to the provisions of Rule 44.2. Precisely in said Rule 38.2 the trial court found support to

hold a separate trial on the issue of notice and the question of negligence. But the power granted to the court by Rule 38.2 to separate independent litigious questions does not extend to the entry of final judgments on said questions, for Rule 38.2 itself limits the power to enter judgment to multiple claim actions. When Rule 38.2 provides for the judgment to be entered, it expressly refers to the judgments that may be entered under Rule 44.2. The case of *Dalman* was decided under former Rule 42(b) of 1943, which was equivalent to Rule 38.2 in force, and which did not have the spur added in 1958 regarding Rule 44.2 to the effect that the court "... may enter judgment in accordance with the terms of Rule 44.2." However, when we decided *Dalman* we construed Rules 42(b) and 54(b)—then in force—together, even though said spur did not exist then, and we held that the interaction of both rules had the effect of limiting the power of the courts to enter final judgments, but only in multiple claim cases.

A cursory examination of current Rule 44.2 reveals the power of the courts to enter final judgments deciding one or more claims in multiple claim suits if the court expressly concludes that there is no reason to postpone the judgment on said claims until the whole suit is settled, and provided that it is expressly ordered that judgment be entered. However, it also provides that any decision other than those mentioned therein (i.e. single claim actions) which does not settle all the claims shall not terminate the suit with regard to any of the claims. In other words, in multiple claim actions, the court may adjudge one or several of them, but it may not adjudge one part of a single claim action.

It should be pointed out that the question raised before us is whether the decision regarding the defense of lack of notice on the Secretary of Justice under 32 L.P.R.A. § 3077a. constitutes a final judgment which defendant

³ See *Barrientos v. Gov. of the Capital*, 97 P.R.R. 539, 558 (1969).

should have appealed. Since said decision was unfavorable to the Commonwealth, the suit was not finished, rather it constituted an interlocutory decision which appellant was not obliged to appeal until the whole case was adjudged. And furthermore, since it is only one claim and not several multiple claims, the judgment did not become final until the damages were adjudged. See *Barrientos, supra*, at 558.

In view of the above, we hold that with the awarding of damages for this claim the court put an end to the suit, thus making the judgment entered ripe for execution. Therefore, the parties may now present for review any of the partial adjudications previously entered by the court below, including the question of the service of notice required by § 3077a. of the Laws of Puerto Rico Annotated.

CLERK'S CERTIFICATE

I Ernesto L. Chiesa, Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on November 18, 1977, in case No. R-76-374, *Gregorio Cortes Roman v. Commonwealth of Puerto Rico and Victor Carrero Figueroa*, the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 11th day of July, 1979.

(s) ERNESTO L. CHIESA
ERNESTO L. CHIESA
Clerk
Supreme Court of Puerto Rico

[SEAL]

[STAMPS]